

CCRB INVESTIGATIVE RECOMMENDATION

Investigator: Nathaniel Flack	Team: Squad #3	CCRB Case #: 201701649	<input type="checkbox"/> Force	<input type="checkbox"/> Discourt.	<input type="checkbox"/> U.S.
			<input checked="" type="checkbox"/> Abuse	<input type="checkbox"/> O.L.	<input type="checkbox"/> Injury
Incident Date(s) Thursday, 03/02/2017 9:00 AM	Location of Incident: East 149th Street between Melrose Avenue and Courtlandt Avenue	Precinct: 40	18 Mo. SOL 9/2/2018	EO SOL 9/2/2018	
Date/Time CV Reported Thu, 03/02/2017 4:17 PM	CV Reported At: CCRB	How CV Reported: Phone	Date/Time Received at CCRB Thu, 03/02/2017 4:17 PM		

Complainant/Victim	Type	Home Address

Witness(es)	Home Address

Subject Officer(s)	Shield	TaxID	Command
1. POM Ernesto Bautista	28399	953671	040 PCT
2. POM Malik Mccloud	30082	954114	040 PCT

Witness Officer(s)	Shield No	Tax No	Cmd Name
1. SGT Jeffrey Baio	4015	947894	040 PCT

Officer(s)	Allegation	Investigator Recommendation
A.POM Ernesto Bautista	Abuse: Police Officer Ernesto Bautista stopped § 87(2)(b)	
B.POM Ernesto Bautista	Abuse: Police Officer Ernesto Bautista frisked § 87(2)(b)	
C.POM Malik Mccloud	Abuse: Police Officer Malik McCloud frisked § 87(2)(b)	
D.POM Ernesto Bautista	Abuse: Police Officer Ernesto Bautista searched § 87(2)(b)	
E.POM Malik Mccloud	Abuse: Police Officer Malik McCloud searched § 87(2)(b)	

Case Summary

§ 87(2)(b) filed this complaint with the CCRB via telephone on March 2, 2017.

At approximately 9:00 am on March 2, 2017, § 87(2)(b) ordered food at a deli on East 149th Street in the Bronx, and stood outside to wait where he had a verbal exchange with a person on a nearby stoop. When PO Ernesto Bautista of the 40th Precinct approached the two men on foot, the stranger fled, and PO Bautista stopped § 87(2)(b) (**Allegation A**). PO Malik McCloud of the 40th Precinct arrived shortly after and along with PO Bautista frisked and searched § 87(2)(b) (**Allegations B, C, D, and E**), while § 87(2)(b) a passerby, watched. No contraband was found. Sgt. Jeffrey Baio of the 40th Precinct arrived and ran § 87(2)(b)'s name for warrants, and § 87(2)(b) was released without being issued a summons.

The investigation obtained video footage of this incident from the deli on 149th Street, the relevant portion of which is excerpted below as Snagit1 (Board Review 01).



Snagit1.mp4

Mediation, Civil, and Criminal Histories

- § 87(2)(b) rejected mediation because he did not believe it would be effective in changing officer behavior.
- As of May 10, 2017, no Notice of Claim has been filed regarding this incident, per the Comptroller's Office.
- § 87(2)(b)

Civilian and Subject Officer CCRB Histories

- § 87(2)(b)
- In four years with the NYPD, PO Bautista has been a subject of nine previous allegations in three CCRB cases. In CCRB case 201506161, allegations of a chokehold and other physical force were substantiated against him with the Board recommending charges. The NYPD disposition is currently pending. In 201600632, allegations of a stop, strip search, physical force, and refusal to obtain medical attention were closed as complainant uncooperative. In 201605586, an allegation of physical force was unsubstantiated.
- In four years with the NYPD, PO McCloud has been a subject of 11 previous allegations in five complaints. § 87(2)(g)

Potential Issues

- During her phone statement (Board Review 02), § 87(2)(b) said that she had additional footage of the incident which she would send to the CCRB. § 87(2)(b) later stated she had difficulty transferring the file from her digital camera to a DVD, but would not agree to have the Field Team retrieve the footage from her, and the investigation has thus been unable to obtain this footage.

Findings and Recommendations

Allegations Not Pleaded

- § 87(2)(b) did not make any allegations against Sgt. Baio, and all officer statements as well as the Stop, Question, and Frisk Report (UF-250) (Board Review 03) are consistent that PO Bautista made the decision to stop § 87(2)(b) and that Sgt. Baio arrived in the middle of the incident and did not order any frisk or search of § 87(2)(b). Therefore, no allegations have been pleaded against Sgt. Baio.

Allegation A: Police Officer Ernesto Bautista stopped § 87(2)(b)

In his March 6, 2017 interview (Board Review 04), § 87(2)(b) said that after getting off a bus, he passed PO Bautista and PO McCloud while walking to a deli, where he ordered a sandwich and stepped outside to wait. A man who happened to be standing by a stoop nearby, who § 87(2)(b) did not recognize, said that there were police officers on the corner, and § 87(2)(b) replied, "I know, I just walked by." § 87(2)(b) did not shake hands with this man or have any physical contact. § 87(2)(b) noticed PO Bautista walking in his direction, and said, "I guess they're coming up the block now." He was not facing towards the other man, and turned his head to speak to him. To § 87(2)(b)'s surprise, the other man suddenly ran away across 149th Street. PO Bautista did not pursue him, and instead grabbed § 87(2)(b)'s jacket and placed him against the nearest storefront. PO Bautista asked § 87(2)(b) why the other man had run, to which § 87(2)(b) replied, "Go catch him and find out – I don't know him." § 87(2)(b)'s March 2, 2017 telephone statement (Board Review 18) was consistent with his interview.

PO Bautista said in his interview (Board Review 06) that he was assigned to a foot post at 149th Street and 3rd Avenue to combat narcotics and robberies. Approximately 20 minutes prior to stopping § 87(2)(b), PO Bautista and PO McCloud saw him standing in front of a bank and talking to another man. § 87(2)(b) appeared to be looking at the officers, but did not make any physical contact with the other male or do anything else besides stand and talk. PO Bautista said that in the past three months an unknown civilian who happened to be in a bank branch with him had pointed at § 87(2)(b) through a window and said that he was a "person that sells." PO Bautista did not investigate this information at the time, saying, "a lot of civilians, they tell you things." PO Bautista had never arrested § 87(2)(b) or the other man, seen them in the stationhouse, or interacted with them previously. PO Bautista initially said that officers had also pointed out § 87(2)(b) to him as a person who had been arrested with narcotics and for a hand-to-hand transaction, but he could not recall who told him this or when it would have been told to him.

After 20 minutes, § 87(2)(b) walked past PO Bautista, who crossed the street to follow him, leaving PO McCloud behind, and watched § 87(2)(b) enter a deli and exit several seconds later. § 87(2)(b) approached a man in front of a nearby building. PO Bautista initially said that officers and civilians had told him that this other man was drug user, though when pressed for specifics said that "people that use, they dress a certain way, they have a certain look to them." PO Bautista saw § 87(2)(b) make a cup shape with his hand and put it into the open hand of the other man, in a motion lasting one or two seconds, which PO Bautista said he believed was longer than a handshake. PO Bautista did not see anything in either man's hand and could only see the back of § 87(2)(b)'s hand. PO Bautista said he had received no training in identifying hand-to-hand transactions, and added that despite foot traffic and being two to three car lengths away, "it just seemed like everything just disappeared, it was just clear as day what I saw." PO Bautista approached the two men and said, "Stop right there." One ran away into traffic, but § 87(2)(b)

did not try to flee, and PO Bautista told him he was being stopped for a narcotics transaction, which he denied. PO Bautista asked § 87(2)(b) “If you didn’t do anything of the sort, why would your man run?” § 87(2)(b) replied that he did not know the other man, and PO Bautista brought him towards the storefront gate with a hand on his body.

PO McCloud said in his interview (Board Review 07) that he and PO Bautista saw § 87(2)(b) talking to people walking by on a street corner approximately 30 minutes prior to the stop. PO McCloud did not recall seeing § 87(2)(b) make physical contact with any passersby, though he recognized § 87(2)(b) as someone who spends approximately 6 to 8 hours per day standing at this corner. PO McCloud said that an officer had pointed § 87(2)(b) out to him prior to the incident as a drug dealer, but PO McCloud said he could not remember who had told him this, whether it happened recently, or where or in what circumstances § 87(2)(b) was pointed out to him. Prior to the stop, PO McCloud and PO Bautista had separated to posts 300 feet apart, and when PO McCloud went back around the corner to look for PO Bautista, he saw he had stopped § 87(2)(b).

Sgt. Baio (Board Review 08) said that when he pulled up to the corner of 149th Street and Melrose Avenue to check on PO Bautista, he saw a male running on 149th Street and looking backwards. He turned on 149th Street and saw that PO Bautista and PO McCloud had stopped § 87(2)(b). Sgt. Baio said he was not previously familiar with § 87(2)(b).

In the UF-250 prepared by PO Bautista (Board Review 03), he indicated that the circumstances leading to the stop were an “apparent hand to hand with unapprehended male.”

In Snagit 1 (Board Review 01), § 87(2)(b) in a tan jacket and red hat, exits the deli and walks away from the camera on 149th Street. He then stands still and slowly paces with his hands in his coat pockets. The top of his body is cut off by the top of the frame. He is not seen to make physical contact with any other people or remove his hands from pockets. Although a man is partially visible on a stoop near § 87(2)(b) he at no point makes contact with § 87(2)(b) who never stops pacing. At 30 seconds, PO Bautista walks towards § 87(2)(b) and the man steps off the stoop behind § 87(2)(b) and runs across 149th Street. § 87(2)(b) walks casually towards PO Bautista as this happens, and does not appear to be aware of the other man until looking to his right to see him run. PO Bautista takes one step in the fleeing male’s direction, but does not pursue him, and instead pushes § 87(2)(b) towards the nearby storefront as § 87(2)(b) raises his hands.

During his interview, PO Bautista was shown Snagit1, and asked whether he could see in the video the motion he believed was a hand to hand transaction, and he said that he could not.

An officer must have a reasonable suspicion that a person has committed, is committing or is about to commit a felony or misdemeanor to stop them. Innocuous behavior alone will not give rise to reasonable suspicion. People v. De Bour, 40 N.Y. 2d 210 (1973) (Board Review 10). No presumption of reliability can attach to an unidentified informant who is not available for further questioning. People v. Patterson, 564 N.Y.S.2d 9 (1990) (Board Review 12). Reasonable suspicion cannot be imputed to a person due to their proximity to a different person known to have committed a crime. People v. Durant, 175 A.D.2d 176 (1991) (Board Review 13). Neither can reasonable suspicion be imputed to someone based on their proximity to a person who flees where the individual stopped does not flee. People v. Thompson, 127 A.D.3d 658 (2015) (Board

In her March 31, 2017 phone statement, § 87(2)(b) said that she head § 87(2)(b) make contact with the storefront gate and then saw either PO Bautista or PO McCloud or both “digging around” in § 87(2)(b)s pockets.

PO Bautista said that after stopping § 87(2)(b) he frisked the outside of his pants and jacket for 10 seconds or less, because people in the area were known to have drug needles and other dangerous items in their pockets. PO McCloud arrived during this time and also frisked § 87(2)(b)s pants and jacket. PO Bautista could not tell whether there were any bulges on § 87(2)(b)s person because of his large jacket. When asked whether he observed anything leading him to believe that § 87(2)(b) was armed, § 87(2)(e), § 87(2)(f)

§ 87(2)(b) He added that he was intimidated by § 87(2)(b) because he was at least 6’2”. PO Bautista did not feel anything inside of any of § 87(2)(b)s pockets through his clothing. He did not recall reaching into § 87(2)(b)s pockets. He did not recall removing anything from his pockets. No contraband was found on § 87(2)(b)s person. PO Bautista asked § 87(2)(b) twice for his I.D., and § 87(2)(b) provided it the second time. Sgt. Baio arrived at this time and ran § 87(2)(b) for warrants, after which he was released without a summons.

PO McCloud said that when he approached PO Bautista and § 87(2)(b) PO Bautista was asking for § 87(2)(b)s I.D., and § 87(2)(b) was yelling, but PO McCloud could not remember what. PO Bautista told him that he had seen § 87(2)(b) engaged in a hand to hand, but § 87(2)(b) was not under arrest. He said he did not remember if he frisked § 87(2)(b) or if PO Bautista did. PO McCloud did not observe any indication that § 87(2)(b) was armed. PO McCloud did not remember if he noticed any bulges on § 87(2)(b)s clothing. PO McCloud did not remember whether he or PO Bautista ever reached into § 87(2)(b)s pockets.

Sgt. Baio said that when he pulled over near the stop, PO Bautista gave him § 87(2)(b)s I.D. After running the I.D. for warrants, § 87(2)(b) was allowed to go.

The UF-250 indicates that PO Bautista frisked § 87(2)(b) to “make sure no weapons were on male stopped.” The circumstances that led to the frisk are described as “the apparent hand to hand in front of drug location.” The form states that § 87(2)(b) was not searched.

At 1 minute in Snagit1, PO Bautista pats the back and waist area of § 87(2)(b)s jacket, and PO McCloud walks towards them. At 2:05, PO McCloud reaches into and feels around the inside of § 87(2)(b)s right front pants pocket. At 2:20, the back of § 87(2)(b)s jacket is lifted up, and PO McCloud runs his hand along § 87(2)(b)s waistband. At 2:27, PO Bautista squeezes the outside of the § 87(2)(b)s pants pocket and then reaches into § 87(2)(b)s right front jacket pocket. He removes something from this pocket and then puts it back in the pocket. At 2:35, PO Bautista reaches into § 87(2)(b)s left front jacket pocket. At 2:48, § 87(2)(b) has been turned around to face the officers, and PO McCloud opens the jacket and appears to reach into an interior pocket. At 3:02 PO McCloud has let go of his jacket, and § 87(2)(b) begins to gesture in a frustrated manner before providing his identification.

When frisking an individual, an officer must have reliable knowledge of sufficient facts to justify the frisk. Information that is subjective, non-particularized, or conclusory in content will not justify a frisk. People v. Carney, 58 N.Y.2d 51 (1982) (Board Review 16). A frisk is permissible

only if an officer possesses a particularized, reasonable suspicion that a suspect is armed. People v. Gonzalez, 295 A.D.2d 183 (2002) (Board Review 17). A police officer may intrude upon the person or personal effects of a civilian only to the extent that is actually necessary to protect himself from harm while he conducts the inquiry, even where that officer possesses reasonable suspicion of criminality and articulable basis to fear for his own safety. People v. Graham, 134 A.D.3d 1047 (2015) (Board Review 05). Once an officer conducts a frisk and does not discover any weapon, it is improper to search the interior of the person's pockets. People v. Rainey, 228 A.D.2d 285 (Board Review 09). In order to search a person, an officer must have probable cause to believe the person is either armed or committing a crime. People v. De Bour, 40 N.Y. 2d 210 (1973) (Board Review 10).

§ 87(2)(b), § 87(2)(g)

[REDACTED]

§ 87(2)(b), § 87(2)(g)

[REDACTED]

Squad: 3

Investigator: _____
Signature Print Date

Squad Leader: _____
Title/Signature Print Date

Reviewer: _____
Title/Signature Print Date